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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES ROOP,

Appellant-Petitioner,

VS.

STATE OF INDIANA.

Appellee-Respondent.

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No. 79A05-0603-PC-162

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0106-PC-00001

December 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

James Roop appeals the denial of his petition for post-conviction relief. Specifically, Roop argues that his trial counsel and appellate counsel were ineffective. Finding no ineffective assistance of either counsel, we affirm the post-conviction court.

Facts and Procedural History

The underlying facts of this case, taken from the Indiana Supreme Court's opinion in Roop's direct appeal, are as follows:

In November of 1997, Roop resided in Lafayette with his wife Cassandra and her fourteen-month-old daughter, K.S. Cassandra's parents, William and Patty Robinson, lived next door. On the evening of November 19, Cassandra changed K.S.'s diaper and put her to bed. Cassandra observed no injuries or bleeding at that time. Roop and Cassandra went to bed sometime after 3:30 a.m. When Cassandra and Roop heard K.S. awaken during the night, Roop got up to attend to her. He did not return to bed. At about 8:00 a.m., Roop awakened Cassandra and told her to come to the living room. Cassandra found K.S. lying on the couch on an open, bloody diaper. She was crying and shaking. Roop was cleaning blood from his hands with baby wipes. Cassandra and Roop took K.S. to the emergency room where Dr. Diane Begley observed a "cut that extended into the hymen and towards the rectum." Dr. Begley believed the injury was the result of sexual molestation and contacted Child Protective Services. She arranged for K.S. to be transferred to Indianapolis to be examined by Dr. Roberta Hibbard, an expert in child sexual abuse. Dr. Hibbard concluded that K.S. had been sexually assaulted. Dr. Trace Scherer, a pediatric surgeon, also examined K.S. in Indianapolis and reached the same conclusion. Dr. Scherer surgically repaired the injury after noting it was fifteen millimeters long and ten millimeters deep.

Roop spoke to police at the hospital in Lafayette and stated that he awakened to change K.S.'s diaper and noticed no injury. He changed her diaper, fed her, and bathed her. He watched cartoons with her, put her back to bed, and went to sleep on the sofa. He later heard her "fussing," and then noticed blood in her diaper. He told police that K.S.'s injury might have been caused by a razor blade on the tub, or by her scratching herself while being changed, or that the cat might have done it.

Roop was charged with two counts of child molesting, battery, neglect of a dependent, and with being a habitual offender. His defense at trial was that someone else--possibly his father-in-law--may have molested

K.S. He did not dispute that K.S.'s injury was the result of sexual abuse. The jury found him not guilty of one count of child molesting and guilty of the remaining counts and the habitual enhancement. He was sentenced to an aggregate term of eighty years imprisonment.

Roop v. State, 730 N.E.2d 1267, 1268-69 (Ind. 2000). Specifically, the trial court sentenced Roop to fifty years for Class A felony child molesting, fifteen years for Class B felony neglect of a dependent, and three years for Class D felony battery. The court enhanced Roop's child molesting conviction by thirty years for his habitual offender status and ran all of the sentences concurrently.

On direct appeal, Roop argued that the trial court erred by excluding testimony from court-appointed special advocate Karen Anderson suggesting that William Robinson may have molested Cassandra during her childhood. Roop also argued that the evidence was insufficient to support his conviction for child molesting. Our supreme court affirmed Roop's convictions. *Id.* at 1271.

In June 2001, Roop filed a *pro se* petition for post-conviction relief, which was amended by counsel in July 2005. Following a hearing, the post-conviction court entered findings of fact and conclusions of law denying Roop post-conviction relief. Roop now appeals.

Discussion and Decision

A defendant who has exhausted the direct appeal process may challenge the correctness of his convictions and sentence by filing a post-conviction petition. *Carew v. State*, 817 N.E.2d 281, 285 (Ind. Ct. App. 2004), *trans. denied*. Post-conviction procedures do not provide an opportunity for a "super-appeal"; rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based on

grounds enumerated in the post-conviction rules. *Id.*; *see also Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006). Generally, “complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective assistance of counsel or issues demonstrably unavailable at the time of trial or direct appeal.” *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002). Post-conviction proceedings are civil proceedings, so a defendant must establish his claims by a preponderance of the evidence. *Carew*, 817 N.E.2d at 285.

A petitioner who appeals the denial of post-conviction relief faces a rigorous standard of review. *Benefiel v. State*, 716 N.E.2d 906, 911 (Ind. 1999), *reh’g denied*. The reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. *Blunt-Keene v. State*, 708 N.E.2d 17, 19 (Ind. Ct. App. 1999). Furthermore, while we do not defer to the post-conviction court’s legal conclusions, we accept its factual findings unless they are clearly erroneous. *Carew*, 817 N.E.2d at 285. To prevail on appeal, the petitioner must establish that the evidence is uncontradicted and leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Prowell v. State*, 741 N.E.2d 704, 708 (Ind. 2001). Roop raises three issues on appeal, only two of which we need to address: (1) whether his trial counsel was ineffective and (2) whether his appellate counsel was ineffective.¹ We address each issue in turn.

¹ The third issue Roop raises, whether his sentence is inappropriate and disproportionate, is a freestanding claim that is unavailable on post-conviction review. “[A defendant] may not raise a freestanding claim of sentencing error. The law in this jurisdiction is settled that sentencing issues which are known and available at the time of direct appeal but are not raised are waived for post-conviction

I. Ineffective Assistance of Trial Counsel

Roop contends that his trial counsel was ineffective. We review claims of ineffective assistance of trial counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*. *Carew*, 817 N.E.2d at 285-86. First, the petitioner must demonstrate that counsel's performance was deficient because it fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002), *reh'g denied*.

Second, the petitioner must demonstrate that he was prejudiced by his counsel's deficient performance. *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002), *reh'g denied*. To demonstrate prejudice, a petitioner must demonstrate a reasonable probability that the result of the proceeding would have been different if his counsel had not made the errors. *Id.* A probability is reasonable if our confidence in the outcome has been undermined. *Id.* If we can easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient. *Id.*

First, Roop argues that his trial counsel was ineffective for failing to object to certain testimony by Child Protective Services ("CPS") Investigator Timothy Copple and

review.” *Reed v. State*, 856 N.E.2d 1189, 1193-94 (Ind. 2006). We do, however, address this issue under appellate counsel ineffectiveness.

Detective Daniel Max Keen.² Specifically, CPS Investigator Copple testified during the State's case-in-chief that on November 20, the day of the alleged molestation, he:

substantiated child molesting against James Roop based on Dr. Hibbard's finding, the statements that had been made by James Roop, observations of the victim that I had made at St. Elizabeth Hospital, as well as statements given by Cassandra Roop.

Appellant's App. p. 99 (emphasis added). During cross-examination by defense counsel, when Detective Keen was being questioned about the adequacy of the searches of Roop's house, the following colloquy occurred:

- Q Okay. Now the next time you go back to the apartment is on the 24th, is that right?
A I believe so, yes, ma'am.
Q All right. And by this time you believe that a crime occurred here, didn't you?
A *I believed that Mr. Roop committed this*, yes, ma'am.

Id. at 98 (emphasis added).

Roop asserts that the above-emphasized testimony violates Indiana Evidence Rule 704(b), which provides:

Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

In particular, Roop alleges that CPS Investigator Copple's and Detective Keen's testimony violates Evidence Rule 704(b) because it "directly stated [their] personal opinion of Roop's guilt and the truth of the allegations." Appellant's Br. p. 13. However, defense counsel testified at the post-conviction hearing that she did not object to Copple's and Keen's testimony because her strategy at trial was that the police jumped

² Roop also raises this issue in the context of fundamental error; however, this doctrine is not available on post-conviction review. *See Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002).

to conclusions about Roop, conducted a sloppy investigation, and failed to look at other suspects. *See* P-C Tr. p. 14-15. She believed that their testimony fit with her strategy and therefore did not object to it.

Counsel is afforded wide discretion in determining strategy and tactics; therefore, courts will accord these decisions deference. *Shanabarger v. State*, 846 N.E.2d 702, 708 (Ind. Ct. App. 2006), *trans. denied*. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* Isolated omissions or errors, poor strategy, or bad tactics do not necessarily render representation ineffective. *Id.* We will not lightly speculate as to what may or may not have been an advantageous trial strategy, as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. *Id.* Because defense counsel did not object to CPS Investigator Copple's and Detective Keen's testimony on strategic grounds, we cannot say that she was ineffective.

Second, Roop argues that his trial counsel was ineffective for failing to present evidence that Cassandra's father, William Robinson, had dissociative disorder, post-traumatic stress disorder, sleep disturbances, difficulty concentrating, and sexual dysfunction.³ Roop claims this evidence "would have provided direct support for the defense argument that Robinson had come next door to the Roop household on the morning in question, and would have directly undercut Robinson's denial that he ever came next door to get K.S. without notifying Roop or Cassandra." Appellant's Br. p. 17. Even assuming that defense counsel was ineffective for failing to present such evidence,

³ Prior to questioning Robinson, defense counsel had argued in favor of the admissibility of Robinson's medical conditions and had been granted leave to cross-examine Robinson along these lines.

there is no prejudice to Roop. First, it is far from clear that Robinson's medical conditions provide "direct support" for Roop's claim that Robinson molested K.S. Second, although Roop advanced the defense at trial that another person molested K.S., there is no evidence implicating anyone other than Roop. As our Supreme Court noted on direct appeal when addressing Roop's sufficiency argument:

When Cassandra put K.S. to bed on November 19, 1997, K.S. was not injured or bleeding. Roop and Cassandra went to bed sometime after 3:30 a.m. on November 20. According to Roop's own account, he is the only person who had contact with K.S. between the time he awoke, changed her diaper and bathed her, and the time he noticed blood in her diaper and awakened Cassandra. The undisputed medical evidence is that K.S. was sexually abused; the only issue is the identity of the perpetrator.

According to Roop, Cassandra or William could have molested K.S. Evidence suggesting these possibilities was presented to and rejected by the jury. On appeal, Roop suggests that Cassandra was in the apartment and had access to K.S., but concedes that in his statements to police he stated that Cassandra did not attend to K.S. in those hours. He now merely suggests that he could not have known what Cassandra was doing while he was asleep. There is no evidence that William was in the apartment at or near the time of the molestation of K.S., let alone that he molested her. Finally, Roop told Cassandra en route to the hospital that he wished he had gone to work that day "[b]ecause this never would have happened." Roop testified at trial that he had made this statement but explained it as follows: "I felt obligated, [K.S.] was under my care and I kind of felt, you know, like since this happened under my care, you know, it was my fault. I mean, I was caring for her at the time" On its face this does not explain the statement that the injury "never would have happened" if Roop had gone to work. The jury was free to consider Roop's statement en route to the hospital as an admission of guilt and this, coupled with his opportunity and the lack of opportunity of others to commit the offense, is sufficient evidence from which the jury could have reasonably found him guilty of child molesting.

Roop, 730 N.E.2d at 1271. According to Roop, he was the only person who had contact with K.S. between the time he awoke, changed her diaper and bathed her, and the time he noticed blood in her diaper and awakened Cassandra. In addition, there is a lack of

evidence that Robinson molested K.S. As such, Roop has failed to demonstrate a reasonable probability that the result of the proceeding would have been different but for defense counsel's failure to present evidence of Robinson's medical conditions. Defense counsel was not ineffective.

II. Ineffective Assistance of Appellate Counsel

Roop contends that his appellate counsel was ineffective. Ineffective assistance of appellate counsel claims generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Reed*, 856 N.E.2d at 1195. To show that counsel was ineffective for failing to raise an issue on appeal, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. *See id.* To evaluate the performance prong when counsel waived issues upon appeal, we apply the following test: (1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are "clearly stronger" than the raised issues. *Id.* If the analysis under this test demonstrates deficient performance, then we examine whether, "the issues which . . . appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial." *Id.* (quotation omitted). Further, we must

consider the totality of an attorney's performance to determine whether the client received constitutionally adequate assistance . . . [and] should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.

Id. at 1195-96 (quotation omitted). Ineffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal. *Id.* at 1196. One reason for this is that the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel. *Id.*

First, Roop argues that his appellate counsel was ineffective for failing to argue on direct appeal that his trial counsel committed fundamental error by failing to object to testimony by CPS Investigator Copple and Detective Keen. As we found above that Roop's trial counsel was not ineffective for failing to object to Copple's and Keen's testimony because it was consistent with her trial strategy, appellate counsel likewise was not ineffective for failing to raise this issue on direct appeal as fundamental error, which has a more stringent standard than ordinary trial court error. *See Davis v. State*, 819 N.E.2d 863, 870 (Ind. Ct. App. 2004) ("Similarly, because we have determined that Davis did not receive ineffective assistance of trial counsel, he can neither show deficient performance nor resulting prejudice as a result of his appellate counsel's failure to raise this argument on appeal."), *trans. denied*; *Smith v. State*, 792 N.E.2d 940, 946 (Ind. Ct. App. 2003), *trans. denied*.

Second, Roop argues that his appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred by refusing to admit testimony from K.S.'s court-appointed special advocate ("CASA") Karen Anderson regarding her concerns about placing K.S. with Robinson and/or Cassandra due to the fact that they had the same access to K.S. as Roop did. We note that appellate counsel did argue on direct appeal that the trial court erred by excluding CASA Anderson's testimony suggesting that

Robinson may have molested Cassandra during her childhood. With regard to this evidence, our Supreme Court held that it was not admissible under Indiana Evidence Rules 404(b) (Other Crimes, Wrongs, or Acts) and 403 (Exclusion of Relevant Evidence). Specifically, the court stated:

Its remoteness in time and the lack of any evidence that the molestation of K.S. was in any way similar to the alleged incident involving Cassandra further undermine its admissibility. In addition to the trial court's finding that the testimony had "almost no probative value," the testimony presented the possibility of confusing or misleading the jury and could have caused undue protraction of the trial.

Roop, 730 N.E.2d at 1270 (footnote and internal citation omitted).

Although there are no Rule 404(b) concerns with the testimony Roop now challenges regarding Anderson's hesitations about placing K.S. with Robinson and/or Cassandra due to the fact that they had the same access to K.S. as Roop did, given CASA Anderson's testimony, such evidence is nevertheless inadmissible. That is, at trial CASA Anderson testified that she had absolutely no basis for her concerns about placing K.S. with either Robinson or Cassandra and that her concerns were based on pure "speculation." Appellant's App. p. 128. On this point, the trial court stated:

The investigators, you know, detectives and police officers oftentimes have a lot of suspicions and, you know, kind of think about things in a certain way, that's their job to think about things in certain ways and that's the job of a CASA to turn over rocks and have suspicions and things, but if she's gonna be testifying about it in court she has to have facts, it has to come in not as her supposition but it has to be evidence, it has to be observations, it has to be something that's admissible, and her suppositions without a foundation are not admissible.

Id. at 128-29. The trial court went on to say that CASA Anderson's "speculation about the hasty placement [of K.S.]" is "remote and has little probative value in this case." *Id.*

at 131. Accordingly, the trial court sustained the State's objection to CASA Anderson's testimony.

We agree with the trial court that CASA Anderson's testimony is inadmissible. Given the trial court's legitimate concerns about the testimony, Roop has failed to prove that this issue is significant and obvious and clearly stronger than those raised on appeal. Appellate counsel was not ineffective on this ground.

Last, Roop argues that his appellate counsel was ineffective for failing to challenge his eighty-year sentence as manifestly unreasonable and disproportionate. We first address Roop's manifestly unreasonable argument. At the time of Roop's direct appeal, appellate courts applied the manifestly unreasonable standard. *See* Ind. Appellate Rule 7(B) (2002) ("The Court shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender."). Effective January 1, 2003, this rule was amended to authorize an appellate court to revise a sentence if it finds "after due consideration of the trial court's decision," that a sentence is "inappropriate in light of the nature of the offense and the character of the offender." App. R. 7(B) (2006). Our Supreme Court has observed that this amendment "changed [the rule's] thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied." *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005). We make these observations to point out that Roop would have faced a more rigorous standard of review in 2000 than he would today under the new standard. In fact,

appellate counsel testified at the post-conviction hearing that he did not challenge Roop's sentence on direct appeal as manifestly unreasonable because:

based on the nature and circumstances of the offense involving a fourteen month old child and having the two prior felony convictions to the habitual I did not think that the Court would find the maximum sentence (inaudible) unreasonable which is a much tougher standard in what (inaudible) inappropriate standard is or inappropriate sentence standard which they changed January 1, 2003.

P-C Tr. p. 39-40.

Appellate counsel was not ineffective for failing to challenge Roop's sentence as manifestly unreasonable. The nature of the offense is heinous, as Roop molested a fourteen-month-old baby, who was also his stepdaughter, by penetrating her vagina, and K.S.'s injuries from the molestation had to be surgically repaired. As for his character, the record shows that Roop, who was a mere twenty-two years old at the time of the instant offenses, had four convictions as an adult, two of which were felonies, and was on probation at the time he committed these crimes. The trial court found no mitigators.⁴ Given the nature of the offense and Roop's character, Roop has failed to prove that this issue would have been meritorious if raised on direct appeal. As such, appellate counsel was not ineffective for failing to argue that Roop's sentence was manifestly unreasonable.

⁴ This fact alone distinguishes this case from *Winn v. State*, 748 N.E.2d 352 (Ind. 2001), upon which Roop relies heavily on appeal. In concluding that the maximum habitual offender enhancement was manifestly unreasonable in that case, our Supreme Court noted that there were several mitigating circumstances, specifically, that Winn had earned a GED, that he had served in the U.S. Army during Operation Desert Storm, and that his incarceration would be a hardship on his family. *Id.* at 361. In addition to finding no mitigators in this case, the trial court noted that many of Roop's prior convictions resulted in probation and rehabilitative programs, many of which he did not complete. The trial court also noted that there were petitions to revoke Roop's probation as well as warrants issued for failures to appear, all of which were followed by additional criminal activity. *Winn* is not controlling.

Roop next argues that his appellate counsel was ineffective for failing to argue that his eighty-year sentence was disproportionate. Specifically, Roop challenges the trial court's enhancement of his maximum sentence for Class A felony child molesting by thirty years, which is also the maximum enhancement. The Indiana Constitution requires that penalties be proportionate to the nature of the offense. Ind. Const. art. I, § 16. The proportionality analysis of a habitual offender enhancement has two components. *Clark v. State*, 561 N.E.2d 759, 766 (Ind. 1990). First, an appellate court should make an inquiry into the "nature" and gravity of the present felony. *Id.* Second, an appellate court should consider the "nature" of the predicate felonies upon which the habitual offender enhancement is based. *Id.*; see also *Young v. State*, 725 N.E.2d 78, 82 (Ind. 2000).

The nature and gravity of the present felony, Class A felony child molesting, are heinous and severe. As for the predicate felonies upon which Roop's habitual offender enhancement is based, Class D felony theft and possession of marijuana, we note that they are not particularly heinous. However, given the heinous nature and gravity of the present offense, Roop cannot establish that this issue would have been meritorious if raised on direct appeal. Although Roop relies heavily on *Clark* on appeal, we point out that the present felony in that case was a Class D felony, a fact that readily distinguishes that case from ours. Appellate counsel was not ineffective for failing to challenge Roop's habitual offender enhancement as disproportionate.

Affirmed.

BAKER, J., and CRONE, J., concur.